

John Russo:

To Sue or Settle:

H: Host

J: John

M: Marc

H: Have we become a litigious society? Dating back to Adam and Eve, the two brothers Cain and Abel apparently had some issues. Perhaps if they had a couple of good lawyers, things would have worked out differently. We see many versions of what happens in the court room on television via the entertainment world. How much is fact and how much is fiction? How many Denny Cranes and Perry Masons are in the world and how close are we to the legal system of our neighbours in the south?

In the studio today we have two experts on the subject of litigation. John Russo is a Partner with Pallett Valo. John practices in the area of commercial litigation with a particular focus on contractual disputes, collections, asset recovery, and enforcement of security. Also with us is Marc Leblanc. Marc is the director of legal services and business affairs at TVO. Marc is a lawyer with extensive business experience in the television, new media and music industries. He has a background in IP, where he spent 5 years in private practice before going to a major Canadian network and heading up the legal arm of business affairs. Marc's focus has always been to use his legal skills and background to advance the business deal and is most interested in how law affects business strategies. Marc, John welcome to the show.

So, John, what is the biggest reason people end up in court? What happens through the process? And why do they end up there?

J: People generally end up in court, obviously starting with a dispute, but the length of the dispute, how it's resolved, generally depends on the reasonableness of the client's position ultimately.

H: So whether they can win?

J: Well everyone thinks they're going to win. You need to go to a lawyer to assess the risk and the likely outcome. Although you can never predict exactly what is going to happen, there are some signs there throughout the course of litigation where it is going to end up, and you should take cues from your counsel in that regard.

H: So Marc, ultimately we want to stay out of court. At least most people want to stay out of court. What are some things we can do in advance to help us stay on the straight and narrow and not need the services of John, who provides a wonderful service, but really it's something we want to try and avoid.

M: Well it's a huge part of any businesses concern. As an in-house counsel my primary job in respect of litigation, is to ensure that there is practices, policies, standards in place, and ensure that we don't end up in litigation and that there is an education process that is ongoing to assist those who have to rely on these standards and practices to make sure they're applying them well. And then once you have those policies and standards in place, you have your education in place, you need to work with those people constantly on specific issues and as they come up help them to make better decisions and should it come to a potentially litigious situation, tackle it.

H: Now John, you're sitting on one side of the fence and Marc's on the other side of the fence, when you have a case before you and I come to you and I say 'you know what, that company over there, they did me a disservice and I want you to help me sue them.' What is the first thing you do?

J: Well, you assess the facts with respect to that particular situation, determine what would be the best outcome for your client. That does not necessarily mean litigation, it means in that particular fact situation, what would be the best result for the client? It may involve litigation, actually commencing an action, or engaging in some type of letter writing campaign with the powers that be at the particular company. Ultimately the assessment has to be what are you likely to recover at the end of the day. Again, you have to listen to your counsel as to what would be a good result, a likely result, and the best result in the circumstances.

H: And they're not always the same.

J: They're not always the same.

H: So Marc do you find, and you've been in the business world for a number of years practicing law, do you find people say 'I'm going to sue them on the principle of it.' Now when somebody says that to you, what's your immediate reaction?

M: To take a deep breath. From an in-house counsel perspective we come across this routinely, typically it's an instance where somebody feels that they have personally been slighted, so there is immediately an emotional investment in something and 'I'm going to make this right' or 'somebody has pointed a finger at me how dare they.' Often the first thing you need to do is take the emotional component out of it and start talking about what's happening in terms of a legal perspective and then as always with these situations if somebody is putting a principled approach on the table you need to do two things from my perspective. First is you need to take a look and see where that lands you with your company's risk comfort, where they can stand on the risk scale. Secondly, you need to take a look at whether or not this truly is an issue that has legal repercussions for the corporation, or whether it is still remaining one that is largely personal.

H: So when it comes down to assessing a dollar value, sometimes you could be defending or attacking based on a copyright infringement or a trademark infringement so sometimes you may not be able to put an exact dollar figure say 'if we win this we get x', could be protecting

something. And that brings up, how we assess what the value is of our lawsuit in the U.S. , John you've been called to the bar in New York and New Jersey, so you've got some experience on south of the border. How is it different on the U.S. side, which we all see on television, and how does that differ from Canada?

J: Well you get the wide difference in lawsuit based on primarily tort cases, personal injury cases in Canada and the United States. In terms of contractual disputes, items that I deal with, the principles are generally the same. The difference might be in the mentality of Canadians versus Americans in terms of how they approach litigation. I can tell you that, having worked with American clients, there is a different mentality there and it is a much more aggressive, adversarial approach to litigation; however, in keeping with the theme of the show, you always come back to the client and try to explain to them what the benefits are of settling, where you're going to end up, and what you're going to spend to get to that.

H: And how is it assessed, because as I understand there is a different system in the U.S. than there is in Canada. In the U.S. you have a compensatory component and then a punitive component, and is that different from Canada?

J: It is, and again just speaking on the personal injury side it is very difficult to obtain punitive damages in Canada, it's not part of our tradition. However, in the United States, we all read the news, punitive damages rewards are routinely provided. In Canada it is quite difficult to obtain that. It is not just a matter of being slighted or wronged or hurt, you must show some other independent, actionable wrong in order to recover punitive damages. Our judges, our lawyers we just don't have that tradition here. But it is out there and there rewards that punitive damages have been given here and there.

H: So Marc, you're sitting as in-house counsel, how do you decide what is a worthy case to proceed with and what is not a worthy case to proceed with? Because in your particular role at TVO you do have all those other, I'll call them soft issues, that maybe you can't put a dollar figure on.

M: Absolutely. The consideration for litigation for me personally in terms of dealing with TVO which is a publically funded entity, a big part of that is your stakeholders, that is your tax payers. And so that formulates a big part of what your risk tolerance is. So when we look to, in terms of the question you are asking, in terms of valuing the litigation, it is rarely, if ever a financial evaluation. It's always typically one that would be 'where does that take us in terms of our mandate, how are we serving our mandate, how are we serving our stakeholders.'